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ALEXANDER L. STEVAS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-

EUGENE B. WEISS,

Petitioner,

v.

ROBERT C. LEHMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a victim of a federal official's intentional tort in violation Fifth Amendment rights may be precluded from a due process claim under the Constitution because of the existence of another federal remedy which this Court found in Carlson v. Green was not an adequate alternative remedy?

2. Whether the destruction of plaintiff's property based on a deliberate pre-deprivation decision which the jury found to be unreasonably wrong is the type of random and unauthorized act which justifies the lack of a pre-deprivation hearing under Parratt v. Taylor?

3. Whether the requirement that plaintiff prove not only intentional destruction of plaintiff's property but also intentional destruction of plaintiff's property interest conflicts with this Court's rejection of the subjective test in Harlow v. Fitzgerald and its decision that an official may be found liable where he could be expected to know that certain conduct would violate statutory or constitutional rights?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Eugene B. Weiss, Mr. Weiss was the Plaintiff in the District Court and Appellee in the Court of Appeals for the Ninth Circuit.

2. Respondent Robert C. Lehman was a Defendant in the District Court and Appellant in the Court of Appeals for the Ninth Circuit.

3. Wayne LaRue who was a Defendant in the District Court was not a party to this Petition.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDINGS..... ii

OPINIONS AND JUDGMENTS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS, STATUTES and REGULATIONS..... 2

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 8

CONCLUSION..... 12

APPENDIX..... 1a

TABLE OF AUTHORITY

Cases:

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)..... 8,9
Carlson v. Green, 446 U.S. 14 (1980)..... 8,9
Harlow v. Fitzgerald, 50 L.W. 4815 (1982)..... 11
Parratt v. Taylor, 451 U.S. 527 (1981)..... passim

United States Constitution:

Fifth Amendment..... 8,9
Seventh Amendment

Statutes:

28 U.S.C. §2671 et seq..... 8,9
42 U.S.C. §1983..... 8,10

Neb. Rev. Stat. §81-8, 209 et seq... 9

Federal Regulations:

36 C.F.R. 261.16

Miscellaneous:

Forest Service Manual, §5335.01b
Forest Service Handbook, §2811.5-3b, §2706-9

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PETITION FOR A WRIT OF CERTIORARI

Eugene B. Weiss petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals was entered May 12, 1982. It is reported at 676 F.2d 2019 and appears on p. 1a of the Appendix.

The Order of the Ninth Circuit Court of Appeals denying a Motion for Rehearing

was entered June 28, 1982. It appears on p. 15a of the Appendix.

The Order remanding the case to the Ninth Circuit Court of Appeals was entered October 5, 1981. It appears on p. 17a of the Appendix.

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 1981, and appears at p. 18a of the Appendix to this Petition. It is reported at 642 F.2d 265.

The Judgment of the United States District Court for the District of Idaho, entered on July 15, 1978, upon a jury verdict of July 14, 1978, appears at p. 24a of the Appendix; the verdict form appears at p. 25a. There is no reported decision of the District Court.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 12, 1982. The Order denying a Motion for Rehearing was entered June 28, 1982. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES and REGULATIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation."

The Seventh Amendment to the United States Constitution provides in pertinent part:

"[No] fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the Common Law."

Title 28, U.S.C. §2674 in relevant part provides:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Title 28 U.S.C. §2680(a) provides:

"The provisions of this chapter and section 1346(b) of this title shall not apply to -
(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a

federal agency or an employee of the Government, whether or not the discretion involved be abused."

36 CFR 261.16, See Appendix, p. 29a

Forest Service Handbook Title 2800, §2811.5-36, see Appendix, p. 28a.

STATEMENT OF THE CASE

Plaintiff brought this action against two Forest Service employees for destruction of Plaintiff's personal property in violation of his Fifth Amendment rights. Jurisdiction was based on 28 U.S.C. § 1331.

The case was tried to a jury in Federal District Court. The jury rendered a verdict in favor of the Plaintiff against Defendant Lehman and the Defendant appealed. The Ninth Circuit Court Of Appeals upheld the judgment entered by the district court. Defendant filed a Petition for Writ of Certiorari. This Court remanded the case for further consideration in light of Parratt v. Taylor, 451 U.S. 527, (1981). The Ninth Circuit Court Of Appeals vacated and remanded the case for further proceedings consistent with its opinion.

Plaintiff's property was located on a valid mining claim owned by three other individuals. The owners had leased the mine claim to Continental Rare Metals from

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1 In the original Complaint jurisdiction was based on 28 U.S.C. § 1332; the Complaint was later amended.

about 1961 to 1968. (Tr.Tr. I. at 145). Plaintiff had built the dredge for the lessee's mining operation. (Tr.Tr. I. at 96). At the termination of the lease, the Lessees had sixty days to remove any equipment; after expiration of that time the equipment left by the Lessee reverted to the mine owners. (Tr.Tr. I. at 99, 146). In 1970 the Plaintiff acquired the remaining equipment in trade for a lease on a dredge at another mining site. (Tr.Tr. I. at 100-101, 146).

In 1970 Plaintiff removed some of the equipment for use on other mining operations. (Tr.Tr. I. at 84). In 1971 the road was barricaded in an attempt by the forest service to close the road. The road was then almost impassable and prevented Plaintiff from removing property from the mining claim. (Tr.Tr. I. at 12-13, 88, 194). There were constant negotiations between the mine claimants and the Forest Service to obtain a reopening of the road. (Tr.Tr. I. at 113, 136, 205-206).

In 1973 Defendant Lehman who was manager of the local Forest Service Ranger Station drew up a work plan to dispose of the property located on the mining claim and reseed the area to return it to its natural condition. The plan included the burning of buildings and burying equipment. (Tr.Tr. I. 22-23). Defendant and other Forest Service employees under his direction carried out the plan. There was conflicting testimony at trial regarding the property and the value of the property which was destroyed. Plaintiff introduced evidence including photographs and the

testimony of several witnesses that the property included valuable mining equipment and parts. (Tr.Tr. I. 124-132). Several items of equipment were destroyed, some were buried, a building containing various items was burned (Tr.Tr. I. at 105, 114, 116), and smaller items including nuts and bolts and steel jig shot were scattered. (Tr.Tr. I. 188, 196). A motor was run over by a bulldozer and was badly damaged. (Tr.Tr. I. 124, 196). The Defendant testified that the property destroyed and buried consisted mainly of collapsed bus bodies, an old refrigerator, barrels and stoves, all of which he characterized as junk. (Tr.Tr. I. at 15-16).

Plaintiff and his son testified of the intended use of the metal and parts, and various other items in another mining operation nearby. (Tr.Tr. I. at 84-91, 117, 186-190). Both the Plaintiff and a used equipment dealer testified regarding the value of the property which was destroyed. (Tr.Tr. I. 242-244, 354-361).

After the bulldozer work was done at the mining claim the road was barricaded and a 20-25 foot culvert which had been put in by the Lessees on the claim (Tr.Tr. I. at 139) was removed and taken to the Ranger Station. (Tr.Tr. I. at 35-36). The road was then impassable by over-the-road vehicles.

Defendant did not give notice either to the Plaintiff or to the mine claim owners of the intended work project. Although the Defendant testified

that he did not know who owned the property at the time it was destroyed, he knew who owned the mine claim. His file contained correspondence from their attorney (Tr.Tr. II. at 519) as well as from the owners and lessees (Tr.Tr. I. at 26). He made no attempt to contact any of these persons regarding the destruction of the property. (Tr.Tr. I. at 30).

Although Defendant was aware that Forest Service regulations required publishing and posting notice where there was a question as to ownership of property and required impounding the property for a period of time before disposing of it, Defendant did not follow such procedures. (Tr.Tr. I. at 29-30, 35).

The jury was instructed that the Plaintiff had the burden of proving that Defendant destroyed the property intentionally (Jury Inst. 19), knowingly and without taking appropriate steps to ascertain and notify the owner and of proving that the property was valuable, (Jury Inst. 22). The jury was also instructed that Defendant was protected by qualified immunity and that they should find for the Defendant if they found that: (1) He was acting within the scope of his duty, (2) He had reasonable grounds to believe his actions were appropriate, and (3) He acted in good faith. (Jury Inst. 25).

The jury returned a verdict against the Defendant and in favor of the Plaintiff for $1,000.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' APPLICATION OF PARRATT v. TAYLOR CONFLICTS WITH THE DECISION OF THIS COURT IN CARLSON v. GREEN AND BIVENS v. SIX UNKNOWN FED. NARCOTICS AGENTS ON AN IMPORTANT CONSTITUTIONAL ISSUE.

The Court decided in Parratt v. Taylor, 451 U.S. 527 (1981), that a fully adequate state remedy precluded a Plaintiff from bringing an action under 42 U.S.C. §1983 against a prison official for the negligent loss of property by the defendant's subordinate. The case to which the court of appeals applied Parratt involves a totally different question: Should a victim of a federal official's intentional tort in violation of the victim's Fifth Amendment rights be precluded from one federal remedy because of the existence of another federal remedy which this Court found in Carlson v. Green, 446 U.S. 14 (1980) was not an adequate remedy.

The Court in Carlson pointed out that an action under the FTCA exists only if the state in which the alleged offense took place would permit a cause of action.

Under the FTCA recovery is only permitted against an official where recovery could be had against a private individual under like circumstances. 28 U.S.C. §2674. In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) where defendants argued that there was an

adequate remedy in tort under state law, the Court responded that to treat the relationship between the citizen and the federal agent as no different from that between two private citizens is to ignore the fact that the agent acting in the name of the United States has a far greater capacity for harm than an individual acting without authority.

In Parratt the Court found that Nebraska's laws provided for redress for injury by state officials.[2] In contrast the Federal Tort Claims Act is not a federal remedial scheme at all. It is merely a waiver of soverign immunity that permits a claimant to attempt to recover against the United States "under the vagaries of state law." Carlson v. Green, supra at 1477, n.1.(concurring opinion). No "process" has been provided at all. As stated in the dissent by Judge Boochever on appeal, "The availability of a FTCA Remedy, as 'a parallel complementary' alternative to a Bivens action, Carlson 446 U.S. 20, 100 S.Ct 1472, does not make Lehman's conduct any less of a violation of Weiss's Fifth Amendment Rights."

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2 The Neb. Tort Claims Act set out a procedure whereby persons can make claims to the State Claims Board, an investigation is made and the Board can allow and settle the Tort claim; if it does not, the claimant may file a court action. See Neb. Rev. Stat. §81-8-209 et seq. (Reissue 1976).

II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN PARRATT .

In Parratt this Court was presented with the question of whether an action for negligence could be brought under 42 U.S.C. §1983 for deprivation of property without due process. The Court held that lack of pre-deprivation process was justified where such process was impracticable because the loss was caused by a random and unauthorized act as long as the State provided a remedy which would fully compensate the victim. In that case as the officials had no way of knowing in advance that the subordinates would mishandle the mail, it was impossible to provide pre-deprivation process. Here, Lehman, the supervising official, made a deliberate pre-deprivation decision, which the jury found to be unreasonably wrong, that the notice provisions should be dispensed with.

The appellate court has either ignored completely the fact finding role of the jury or has totally misapplied the principles set out in Parratt. The court found that it could not determine on the limited record whether a meaningful deprivation process was impractical. The court stated:

> "Since removal of mere debris, such as an old rusty car body thought to be here, based on the evidence in the

record, would appear to have been no more than a negligent oversight."

The characterization by the court of Defendant's conduct as no more than a negligent oversight ignores the findings of the jury. The jury was instructed that it could not find for the Plaintiff unless Defendant destroyed the property intentionally and without taking appropriate steps to notify the owner. Yet it was the judgment of the court of appeals that on remand plaintiff should be allowed to pursue a due process claim by showing "additional facts, such as an intentional destruction of his property interest, that would make the Parratt limitation inapplicable." The apparent distinction being made by the court is that it is not enough that Defendant intend to destroy the property; he must intend to destroy a property interest. This subjective requirement goes beyond any intent requirement in either civil or criminal law.

III

THE SUBJECTIVE ELEMENT REQUIRED BY THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISION OF THIS COURT IN HARLOW v. FITZGERALD.

This Court recently decided in Harlow v. Fitzgerald, 50 L.W. 4815, June 24, 1982, in the context of an executive immunity question, that an objective rather than subjective test should be applied to determine the liability of officials. The Court held that government officials performing discretionary functions may be

liable for civil damages where their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 4820.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the Judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon all parties required to be served by depositing copies of same in the United States mail, first class, postage prepaid, addressed to:

Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

Mr. Steinmeyer
Ms. Katherine S. Gruenheck
Department of Justice
Civil Division, Room 3617
Washington, D. C. 20530

DATED this _____ day of September, 1982.

_____
Claude Marcus
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4101

E. B. WEISS,
Plaintiff-Appellee,

v.

R. C. LEHMAN and WAYNE LaRUE,
Defendants-Appellants.

Submitted Dec. 22, 1981

Decided May 12, 1982

Appeal from the United States District Court
For the District of Idaho

Before: VAN DUSEN, *, FARRIS and COOCHEVER, Circuit Judges.

FARRIS, Circuit Judge:

We consider this case for a second time on remand from the Supreme Court for reconsideration in light of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

The sole issue in our initial decision, 9 Cir., 642 F.2d 265 (1981), was whether a Bivens-type damage remedy had been properly implied against defendant Lehman, a Forest Service employee, to

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*Honorable Francis L. Van Dusen, Senior United States Circuit Judge, for the Third Circuit, sitting by designation.

remedy a violation of plaintiff Weiss' rights under the Fifth Amendment Due Process Clause.[1] In light of Parratt, we now consider the threshold issue, not raised in the first appeal, whether plaintiff Weiss' due process rights in fact were violated.

Weiss' claim arises out of the destruction of certain equipment and metal objects, consisting principally of three collapsed bus bodies, a metal box, eight empty barrels, and some refrigerators and stoves, which were left unattended on an unpatented mining claim on federal land for six years. Lehman disposed of the property as part of a clean up exercise. Weiss filed suit, however, asserting an ownership interest in the property, and claiming that its destruction was a violation of his Fifth Amendment due process rights. Weiss claimed that one of the mine claimants had traded the property to him in exchange for a lease on a dredge at another mining site. Weiss' ownership interest was not recorded, and Weiss did not claim that Lehman or any other Forest Service employee had actual knowledge of Weiss' interest. Nor did Weiss allege that Lehman acted with the intent to destroy property known or thought to belong to another person.

Parratt involved the negligent loss of a prison inmate's mail order hobby kit. Proceeding against various prison officials under 42 U.S.C. Sec. 1983, the prson inmate claimed that he had been deprived of his property without due process of law in violation of the Fourteenth Amendment. The Supreme Court found no due process violation.

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1. Finding neither "special factors counselling hesitation" nor an "equally effective alternative remedy," we affirmed.Our decision was vacated. ____U.S.____, 102 S.Ct.80, 70 L.Ed.2d 76 (1981)

Parratt states that

> either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process.

Id. at 539, 101 S.Ct. at 1915.

Here there was no need for quick action. Our task, then, is to decide whether meaningful predeprivation process was impractical and an adequate postdeprivation remedy was available. If so, Weiss did not suffer a deprivation of his property without due process of law.

(1) We find, however, that we cannot determine from the limited record before us whether meaningful predeprivation process was impractical. Weiss' allegations, and the evidence offered in their support, permit a conclusion that Lehman acted no worse than negligently with respect to Weiss' ownership interest. Weiss argues that the deprivation would not have occurred had Lehman followed proper Forest Service procedures for the destruction of personal property. See 36 C.F.R., Sec. 262.4, which provides for impoundment and disposition of personal property after notice to the owner, or if the name and address of the owner are unknown, then after specified public notice. Since removal of mere debris, such as an old, rusty car body thought to be abandoned and worthless, would not require compliance with 36 C.F.R. Sec. 262.4, the asserted failure to comply here, based on the evidence in the record, would appear to have been no more than a negligent oversight. If there was merely a negligent

departure from proper procedures, then such failure to follow procedures was no less "random and unauthorized" than the departure from procedure by the prison officials in Parratt. Under such circumstances, meaningful predeprivation process would be impractical for the same reasons that it was not practical for the prison officials in Parratt to provide a hearing prior to the tortious loss of the prison inmate's property. See id. at 541, 101 S. Ct. 1915.

(2, 3) As in Parratt, Weiss does not argue that the Forest Service procedures themselves are defective. The Forest Service is not and cannot be expected to publish notice before destroying abandoned and worthless property. Nor can the Forest Service reasonably be expected to provide notice before negligently departing from proper procedures by destroying property erroneously believed to be abandoned and worthless.

(4) The second requirement of Parratt is more clearly satisfied. Weiss had an adequate alternative remedy under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b), 2671-2680.

(5) Weiss' attempt to fit Lehman's conduct into the "discretionary function or duty" exception to liability, 28 U.S.C. Sec. 2680(a), fails. "The distinction generally made in the application of the discretionary function exemption is between those decisions which are made on a policy or planning level, as opposed to those made on an operational level." Thompson v. United States, 592 F. 2d 1104, 1111 (9th Cir. 1979). See Lindgren v. United States, 665 F. 2d 978, 980 (9th Cir. 1982) (quoting Thompson v. United States). Cf. Blessing v. United States, 447 F. Supp. 1160 (E. D. Pa. 1978). Here, Lehman's conduct was on the operational level rather than the planning level. See Hatahley v. United States, 351 U.S. 173, 76 S. Ct. 745,

100 L. Ed. 1065 (1956). In Hatahley, Navajo Indians sued under the Federal Tort Claims Act to recover for the wrongful destruction of their horses. The horses had been grazing on public lands of the United States when they were seized. Federal Agents failed to comply with notice requirements specified by the Federal Range Code before destroying the horses. The government's reliance on Section 2860(a) as a bar to liability was rejected. Id. at 181, 76 S. Ct. at 751.

The result in Parratt avoided trivalizing the Fourteenth Amendment.

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983. Such reasoning "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." Paul v. Davis, 424 U. S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405.
>
> We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

Id. at 544, 101 S. Ct. at 1917. To permit the jury in this case to find a due process violation based solely on mere negligence would be inconsistent with the more limited role of the Due Process Clause contemplated by Parratt.

The judgment in favor of Weiss is vacated. On remand, Weiss should have the opportunity to pursue a due process claim by showing additional facts, such as intentional destruction of his property interest, that would make the Parratt limitation inapplicable.[2]

Vacated and Remanded for further proceedings consistent with this opinion.

BOOCHEVER, Circuit Judge, dissenting:

I do not share the majority's belief that our original decision in this case (642 F. 2d 265 (9th Cir. 1981) is incorrect in light of Parratt v. Taylor, 451 U. S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

I

BACKGROUND

Under Bivens v. Six Unknown Named Agents, 403 U. S. 388, 91 S. Ct. 1999, 29

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2. We do not decide now whether a due process violation could be predicated on acts greater than negligence but less than intentional conduct.

> The intent question cannot be given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a Sec. 1983 action." Baker v. McCollan, 443 U. S. 137, 139-140, 99 S. Ct. 2689, 2692-2693, 61 L. Ed. 2d 433 (1979). Rather, we must give close attention to the nature of the particular constitutional violation asserted in determining whether intent is a necessary element of such a violation.

Parratt, 451 U. S. at 547-48, 101 S. Ct. at 1919 (Powell, J., concurring).

L. Ed. 2d 619 (1971), as interpreted in Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) and Davis v. Passman, 442 U. S. 228, 245-48. 99 S. Ct. 2264, 2277-78, 60 L. Ed. 2d 846 (1979), a plaintiff injured by a federal employee's violation of the plaintiff's constitutional rights is entitled to recover money damages where there is neither a special factor counselling hesitation nor an equally effective alternative remedy. Bivens, 403 U. S. at 396-97, 91 S. Ct. at 2004-05. In our original decision, we affirmed the jury verdict and award of damages for Weiss because neither of the above limitations on a Bivens action were present.

We found no reason to "hesitate" in implying a damage remedy because Lehman "was adequately protected by the availability at trial of a qualified immunity defense." 642 F. 2d at 267. Indeed, the case was tried to the jury on the issue of whether Lehman was entitled to qualified immunity. There was sharply disputed evidence regarding the nature and value of the destroyed property.[1] Clearly implicit in the jury's verdict for Weiss, that was made after jury instructions to which no objection has been

[1] Weiss introduced evidence, including photographs and the testimony of several witnesses, showing that the property included valuable mining equipment and parts. The record also contains disputed evidence regarding whether Weiss failed to remove the property because the road to it was unusable or because the property was worthless.

raised on appeal,[2] are findings that the property had value and that Lehman's actions were not entitled to qualified immunity. In Butz v. Economou, 438 U.S. 478, 505-07, 98 S.Ct. 2894, 2910-11, 57 L.Ed.2d 895 (1978), the Court held that an official was protected by qualified immunity unless he knew or should have known that his conduct was unlawful. We were not "hesitant" in our original decision in implying a Bivens remedy because the qualified immunity defense meant that Lehman was not being held individually accountable for "mere mistakes in judgment." Id. at 507, 91 S.Ct. at 2911. Nevertheless, as discussed more fully below, the majority, in its attempt to bring this case within Parratt's scope, ignores the jury's fact-finding role and infers that the property was valueless debris that Lehman "acted no worse than negligently" in destroying. Majority slip op. at 2021, at ____.

We also held in our initial decision that the Tucker Act and the Fifth Amendment did not offer Weiss the short of equally effective alternative remedy that precludes brining a Bivens action. We noted that, in light of Carlson v. Green, Lehman had abandoned his claim that the Federal Tort Claims Act (FTCA), 28 U.S.C. Sections 1346(b), 2680, afforded an adequate alternative remedy. 642 F.2d at 266 n.2. I believe that Carlson rather than Parratt is the controlling precedent here, and that, even if Paratt were applicable, the majority errs in applying the standards set forth therein.

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2. The jury was instructed that Lehman was protected by qualified immunity if, inter alia, "there existed reasonable grounds for the belief that the action taken was appropriate" and Lehman "acted in good faith." The court explained that "good faith" meant that Lehman:

II

Carlson and Parratt

In Carlson, the plaintiff brought a Bivens action alleging that a federal prison official had violated her deceased son's constitutional rights by failing to provide proper medical attention. The Court discussed at length whether the plaintiff's available remedy under the FTCA precluded her from bringing a Bivens action. After reviewing the Congressional comments accompanying the 1974 amendments to the FTCA, the Court concluded that it was "crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action." 446 U.S. at 20, 100 S.Ct. at 1472. The Court went on to hold that, in the absence of an explicit expression from Congress to the contrary, a victim of wrongdoing by a federal official has an action against the Government under the FTCA as well as a Bivens action against the individual official.

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had an honest belief, after a reasonable investigation of the facts, that (his) action was a proper exercise of (his) authority; and that (he) acted without any motivation of malice, ill will, anger, revenge, personal animosity, or the like; and, further, that (his) action was not taken with a careless disregard of the rights of any person affected.

The jury was further instructed that it must find for Lehman: (a) unless he destroyed the property knowingly, voluntarily, and intentionally and not because of a reasonable mistake or accident; (b) if he "were merely abating or removing exposed or insanitary refuse or valueless debris;" or (c) he acted within the bounds of his lawful authority.

In contrast to Carlson and the present case, Parratt turned on whether the availability of a fully adequate state remedy precluded a plaintiff from bringing an action under 42 U.S.C. Section 1983 against a state prison official for the negligent loss of property. It was undisputed in Parratt that the state official was at worst negligent and that the plaintiff could have been fully compensated through his available state remedies. 451 U.S. at 537, 543-44, 101 S.Ct. at 1916-17.

The alternative-remedy issue in Parratt was not, as in Carlson and the present case, which of two federal remedies should have been pursued by a victim of a federal official's intentional tort, but, rather, whether negligent actions by state officials are actionable under Section 1983 (where no pre-deprivation notice is practical) if the state provides an adequate remedy. The focus in Parratt was on whether a federally actionable due process violation had occurred. The issues in Carlson and the present case are completely different. The availability of a FTCA remedy, as "a parallel, complementary" alternative to a Bivens action, Carlson, 446 U.S. at 20, 100 S.Ct. at 1472, does not make Lehman's conduct any less of a violation of Weiss's Fifth Amendment rights. The alternative state remedy was significant in Parratt because without it there would have been a federally actionable due process violation. In contrast, the question in this case turns on whether the availability of alternative remedies precluded a Bivens action. There is no question but that all the various post-deprivation procedures -- i.e., Bivens, FTCA, and Tucker Act actions -- satisfy due process.

One clear indication of how distinguishable Parratt is from the situation in Carlson and the present case is the fact that neither Bivens nor Carlson were even mentioned in Parratt. Five Justices filed concurring opinions in Parratt, in

which they emphasized, inter alia, the narrow scope of the Court's holding. The concurring Justices emphasize that Parratt turns on whether unintentional acts by state officials should be actionable in federal court under the Due Process Clause. See, e.g., 451 U.S. at 545-46, 547, 101 S.Ct. at 1917-18. For example, Justice Powell cautions that the Due Process Clause should not become a vehicle for federal litigation of state torts under Section 1983, "a statute that already has burst its historical bounds." Id. at 549 n. 7, 550-52, 554, 101 S.Ct. at 1920 n. 7, 1921, 1923. These concerns are inapposite to whether the availability of an alternative federal remedy precluded Weiss from bringing a Bivens action against Lehman.

III

The Parratt Test

Even if the Parratt test were applicable here, I would reach a different result from the majority in applying it. I believe that there was a practical means of affording pre-deprivation process and that no meaningful alternative to a Bivens remedy existed after the taking.

First, this is not the type of case where it was impractical to provide meaningful pre-deprivation process. In Parratt, the claim was made against supervisory prison officials to recover the value of materials lost due to the negligent failure of subordinates to follow normal procedures in handling mail. Because the officials had no way of knowing in advance that the subordinates would mishandle the mail, it was impossible to provide pre-deprivation process. In contrast, Lehman, in his capacity as the manager of the Forest Service Ranger Station that performed the clean-up operation, made a deliberate decision not to publish notice before destroying Weiss'

property. There was ample opportunity to give notice had Lehman correctly evaluated the status of the property. Although there was not the type of impracticality here as existed in Parratt, it still may be argued that, once the decision was made that the property was abandoned and valueless, it was impractical to publish notice. This is far from the type of "random and unauthorized" conduct that made notice impractical in Parratt. 451 U.S. at 541, 546, 101 S.Ct. at 1915, 1918. Here, Lehman, the supervising official, made a deliberate pre-deprivation decision, which the jury found to be unreasonably wrong, that the notice provisions should be dispensed with.

Second, I also question whether the FTCA is a "meaningful means" by which to assess the propriety of Lehman's action. Parratt, 451 U.S. at 539, 101 S.Ct. at 1915. In my opinion, the FTCA would be a "highly questionable" as opposed to a "meaningful" means because of the Act's discretionary function exemption. [3] The majority

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[3] Section 2680(a) of the Federal Tort Claims Act provides that liability should not be imposed on the basis of "the exercise or performance or the vailure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This discretionary function exception has presented interpretive problems from the time of its enactment. The principal difficulty is simply that all federal employees exercise a certain amount of discretion in the discharge of their duties. Courts have responded to the need to draw the elusive line between protected and unprotected activities by fashioning various tests such as the "planning-operational test," the "good Samaritan" test, and the balancing-

relies principally on the case of Hatahley v. United States, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956) in contending that Lehman-s acts do not fall within the discretionary function exemption. In that case, however, it was undisputed that the Government officials knew the identity of the owners of the horses they destroyed, yet failed to give notice required by the appropriate federal regulations. The Court stated:

> We are here not concerned with any problem of a "discretionary function" under the Act, see Dalehite v. United States, (346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427). These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.

351 U.S. at 181, 76 S.Ct. at 752.

Had Weiss pursued this action under the FTCA, the Government would certainly have argued that Lehman's decision that notice was unnecessary because the property was abandoned and valueless constituted an act of discretion. Although not airtight, such an argument would have substantial merit. See Dalehite v. United States, 346 U.S. 15, 35-36, 73 S.Ct. 965, 967-968, 97 L.Ed. 1427 (1953); Martin v. United States, 546 F.2d 1355 (9th Cir. 1976), cert. den-

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of-policy-factors test. See generally Caban v. United States, 671 F.2d 1230 (2d Cir. 1982). Under any of these tests, I feel it is highly questionable whether Weiss would have an action against the Government under the FTCA.

ied, 432 U.S. 906, 97 S.Ct. 2950, 53 L.Ed.2d 1078 (1977); Youngstrom v. Dunn, 447 F.2d 948 (8th Cir. 1971) (per curiam); United States v. Delta Industries, Inc., 275 F.Supp. 934 (N.D. Ohio 1966). The FTCA provides that judgment in a tort claims action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the Government whose act or omission gave rise to the claim". 28 U.S.C., Section 2676. Thus, by filing under the FTCA, Weiss would have taken a a substantial chance of losing because of the discretionary function exception and of being barred from bringing a subsequent action. Under these circumstances, so fragile a remedy as the FTCA is not a meaningful means to assess the propriety of Lehman's actions.

For all the reasons discussed, I would adhere to Judge Farris' original opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. B. WEISS,

Plaintiff-Appellee,

vs.

R. C. LEHMAN and WAYNE LaRUE,

Defendants-Appellants.

No. 79-4101

ORDER

*

Before: VAN DUSEN, FARRIS, and BOOCHEVER, Circuit Judges.

Judges Van Dusen and Farris have voted to deny the petition for rehearing. Judge Boochever has voted to grant rehearing. Judge Van Dusen would add the following paragraph.

The petition for rehearing inaccurately states that the May 1982 opinion "begins with a statement of facts," whereas that opinion clearly states only that "Weiss' claim arises out of the destruction of certain equipment and metal objects . . ." (emphasis supplied). The opinion does not purport to determine the facts, but only remands to give Weiss "the opportunity to pursue a due process claim by showing additional facts." This is in accordance with the recent opinion of the Supreme Court of the United States in Pullman-Standard v. Swint, ___ U.S. ___ (Apr. 27, 1982, 50 U.S.L.W. 4425, 4430), where the Court said, inter alia, "a remand is the proper course

unless the record permits only one resolution of the factual issue."

The petition for rehearing is denied.

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* Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 79-4101
DC No. CV 75-36 RM
Idaho (Boise)

E. B. WEISS, Plaintiff-Appellee, vs. R. C. LEHMAN and WAYNE LaRUE, Defendants-Appellants.	)	ORDER

Before: VAN DUSEN*, FARRIS and BOOCHEVER, Circuit Judges.

This case was remanded by the Supreme Court for further consideration in light of Parratt v. Taylor, 49 U.S.L.W. 4509 (1981). Counsel are directed to file simultaneous supplemental memoranda addressing the issues in Parratt within twenty-one (21) days from the date of this Order.

BY ORDER OF THE COURT:

Christopher W. Vasil
Acting Clerk of Court
/s/ Cathy A. Catterson
By: Cathy A. Catterson
Deputy Clerk

* Honorable Francis L. Van Dusen, Senior United States Circuit Judge, Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4101

E. B. WEISS,
Plaintiff-Appellee,
v.

R. C. LEHMAN and WAYNE LARUE,
Defendants-Appellants.

Argued and Submitted Nov. 7, 1980

Decided Jan. 26, 1981

As Amended March 30, 1981

Appeal from the United States District Court
for the District of Idaho

Before: VAN DUSEN,* FARRIS and BOOCHEVER, Circuit Judges.

FARRIS, Circuit Judge:

The sole issue presented by this appeal is whether a *Bivens*-type damage remedy was properly implied against defendant Lehman, a Forest Service employee, under the Fifth Amendment due process and just compensation clauses.[1] We affirm.

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* Honorable Francis L. Van Dusen, Senior United States Circuit Judge, for the Third Circuit, sitting by designation.

[1] Jurisdiction in the trial court was first alleged under 28 U.S.C. § 1332 (1976) (diversity); that jurisdictional allegation was later amended to an allegation under 28 U.S.C. § 1331 (1976) (federal question). Jurisdiction on appeal is based on 28 U.S.C. § 1291 (1976).

I. FACTS

Lehman appeals an adverse judgment in a suit against him for damages for destruction of certain personal property located on an unpatented mining claim on federal land. The claim had been leased in 1967-68 to Continental Rare Metals, which contracted with Weiss to construct a dredge for a mining operation. When Continental's lease expired, it did not remove its equipment, which reverted to the mine claimants under the terms of the lease. Certain of the "scrap" metal and parts were later traded to Weiss by one of the mine claimants in exchange for a lease on a dredge at another mining site. Weiss's interest in the claim was unrecorded.

Lehman, as a U.S. Forest Service employee, drew up a plan to dispose of the property on the mining claim in 1973. Under Lehman's direction, Forest Service workers buried or removed most of the property on the claim and closed the access road.

Weiss's suit against Lehman was tried to a jury on the issue of whether Lehman was entitled to qualified immunity. The jury answered that question by awarding a verdict for Weiss in the sum of $1,000 damages plus costs.

Lehman argues on appeal that the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1976 & Supp. II 1978), in conjunction with the Fifth Amendment just compensation clause, provided an equally effective alternative remedy for Weiss.[2] *See Carlson v. Green*, 446 U.S. 14 (1980).

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[2] In light of *Carlson v. Green*, 446 U.S. 14 (1980), decided following submission of briefs in this case, Lehman has abandoned his contention that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 (1976), provides an equally effective alternative remedy.

II. ANALYSIS

The availability of implied causes of action for money damages against federal officers in their individual capacities for violation of constitutional rights was established in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (Fourth Amendment violation). The *Bivens* Court reasoned that when "no special factors counsell[ed] hesitation in the absence of affirmative action by Congress," *id.* at 396, and when "no explicit congressional declaration [required] that persons so injured . . . be remitted to another remedy, equally effective in view of Congress," *id* at 397, a plaintiff injured by a federal officer's violation of his constitutional rights was entitled to recover money damages. Although the Supreme Court had earlier reserved judgment on the applicability of *Bivens* to other constitutional violations by federal officers, *see Butz v. Economou*, 438 U.S. 478, 486 n.8 (1978), its two most recent decisions found neither special factors counselling hesitation nor equally effective alternative remedies. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (due process, equal protection, and Eighth Amendment violations); *Davis v. Passman*, 442 U.S. 228, 245-48 (1979) (Fifth Amendment due process violations).

A. *Special Factors Counseling Hesitation*

First, we must determine whether "special factors" counsel hesitation in implying a *Bivens*-type remedy. Specifically, we must assess whether Lehman occupies such an "independent status" in our constitutional scheme to render a judicially-created remedy against him inappropriate. *Carlson v. Green*, 446 U.S. 14, 19 (1980). Lehman, as a Forest Service employee, does not occupy a position of such constitutional stature that

implication of a damages remedy against him will significantly impair his ability to perform public functions, *see Butz v. Economou*, 438 U.S. 478, 507 (1978). *Cf. Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (federal marshals). *But cf. Bishop v. Tice*, 622 F.2d 349, 357 & n.16 (8th Cir. 1980) (availability of civil service remedies for wrongfully discharged federal employee was special factor counseling hesitation); *Bush v. Lucas*, 598 F.2d 958, 961 (5th Cir. 1979) (same), *vacated*, 446 U.S. 914 (1980) (in light of *Carlson*). He was adequately protected by the availability at trial of a qualified immunity defense. *See Butz*, 438 U.S. at 506-07.

B. *Equally Effective Alternative Remedy*

Second, we must determine whether relief under the Tucker Act-Fifth Amendment just compensation clause is both an alternative and "equally effective" remedy to a *Bivens*-type action.

The Tucker Act provides in relevant part that:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . .

28 U.S.C. § 1491 (1976 & Supp. II 1978). *See id.* § 1346 (a)(2) (district courts have concurrent jurisdiction when claim does not exceed $10,000). The Tucker Act is jurisdictional only; the source of a substantive right enforceable against the United States for money damages must be found elsewhere. *United States v. Testan*, 424 U.S. 392, 398 (1976). That substantive right is provided by the Fifth Amendment just compensation clause for one whose property is taken by the govern-

ment, *e.g.*, *United States v. Causby*, 328 U.S. 256, 267 (1946); *Jacobs v. United States*, 290 U.S. 13, 16 (1933), whether the property so taken is either real or, as here, personal, *e.g.*, *King v. United States*, 427 F.2d 767, 769, 192 Ct. Cl. 548 (1970). The Tucker Act and Fifth Amendment just compensation clause, then, do provide an alternative remedy.[3]

We must next determine whether the Tucker Act-Fifth Amendment remedy is equally effective to the *Bivens*-type remedy. *Under Carlson v. Green*, 446 U.S. 14, 18-19 (1980), the proper inquiry is whether Congress has provided an explicitly declared substitute remedy. Here, Congress has not declared the Tucker Act-Fifth Amendment remedy to be exclusive. *Cf. Carlson*, 446 U.S. at 19-20 (Congress explicitly declared F.T.C.A. to be an alternative to, rather than a substitute for, a *Bivens*-type remedy).

Additional factors support our determination that a *Bivens*-type remedy is appropriate. *See Carlson*, 446 U.S. at 20-23. The deterrence of unconstitutional acts by government officers is better served by the *Bivens*-type action, since damage recovery is against the federal officers individually, than by the Tucker Act-Fifth Amendment claim against the United States. *See id.* at 21. The *Bivens*-type action is also superior to the Fifth Amendment claim made under the Tucker Act because, as here, it provides for trial by jury. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 587 (1941) (Court of Claims' procedure may be restricted to nonjury trials when Congress consents to suit against the United States). *See also Carlson*, 446 U.S. at 22-23.

The Tucker Act-Fifth Amendment just compensation claim is less than equally effective to the *Bivens*-type

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[3] The appropriate court in which to bring such a claim would depend on the alleged value of the property taken. *See* 28 U.S.C. § 1346(a)(2) (1976 & Supp. II 1978).

remedy here. This conclusion comports with our prior decisions implying causes of action directly under the Fifth Amendment due process clause. *E.g., Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (First, Fifth, and Eighth Amendments); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1363-64 (9th Cir. 1978) (on denial of rehearing), *aff'd in part and rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). *Accord, Micklus v. Carlson*, 632 F.2d 227, 235-36 (3d Cir. 1980).

Affirmed.

JUDGMENT ON JURY VERDICT CIV 31 (7-63)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil Action File No. 3-75-36

E. B. WEISS

vs.

R. C. LEHMAN and WAYNE LARUE

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Ray McNichols, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, this 14th day of July, 1978,

It is Ordered and Adjudged That the Plaintiff, E. B. Weiss take nothing against the Defendant Wayne LaRue and it is

FURTHER ORDERED AND ADJUDGED That the Plaintiff, E. B. Weiss, receive Judgment assessed against the Defendant R. C. Lehman in the sum of One Thousand and no/100 Dollars ($1,000.00) actual damages together with Costs in the amount of $216.50.

Dated at Moscow, Idaho, this 15th day of July, 1978.

JERRY L. CLAPP
Clerk of Court

by /s/ Loa Jean Barden
LOA JEAN BARDEN
Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 3-75-36

E. B. WEISS,

Plaintiff

vs.

R. C. LEHMAN and WAYNE LaRUE,

Defendants.

VERDICT

We, the Jury, find in favor of:

1. The defendant, R. C. LEHMAN, and against the plaintiff

No

(Yes or No)

2. The defendant WAYNE LaRUE, and against the plaintiff

Yes

(Yes or No)

(If you answer BOTH 1 and 2 above "Yes", do not continue, but date and sign the form. If you answer either 1 or 2 above "No", answer question number 3 below.)

3. The plaintiff, E. B. WEISS, and against the (defendants [marked out]) (defendant), and assess the plaintiff's actual damages in the sum of $1,000.00.

(Mark through the word that does NOT apply.)

July 14, 1978
(Date)

/s/ Harold E. Harman
HAROLD E. HARMAN
(Foreman)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 3-75-36

E. B. WEISS,

Plaintiff,

v.

R. C. LEHMAN and WAYNE LARUE,

Defendants.

ORDER

This matter is before the Court on a motion of the defendants for summary judgment and on a cross-motion of the plaintiff for the Court to determine the issues of jurisdiction and the applicable statute of limitations.

The basis for the prayer for summary judgment is the contention that the defendants as employees of the United States acting in their official capacity in carrying out the alleged wrongful acts were absolutely immune from suit, or at least had a qualified immunity.

Defendants by answer have also challenged the jurisdiction of the Court and have alleged that the cause of action is time-barred by the applicable statute of limitations. Plaintiff in its cross-motion asks the Court to rule on these issues.

Briefs and documentary showings have been filed and examined. No oral argument is required.

Under the showing made to support the motion for summary judgment, I conclude that the defendants are not entitled to judgment as a matter of law on the immunity issue.

It appears that the Court has jurisdiction and that the applicable state of Idaho three-year statute of limitations had not run.

IT IS THEREFORE ORDERED:

1. That the motion of the defendants for entry of summary judgment is denied.

2. That the complaint states a claim upon which this Court can grant relief.

3. That the Court has subject matter jurisdiction.

4. That the claim of the plaintiff is not time-barred by the applicable statute of limitations.

Dated: October 5th, 1977.

/s/ Ray McNichols
RAY MCNICHOLS
Chief Judge
U.S. District Court
District of Idaho

FOREST SERVICE HANDBOOK
TITLE 2800 - MINERALS MANAGEMENT

Section 2811.5-3b

b. Unoccupied Buildings on Mining Claims. There are many structures scattered through the Forests which are objectionable as fire hazards and are also dangerous to the public. Such cabins or other structures that appear to have been abandoned on unpatented mining claims may not be destroyed without the owner's consent or until the mining claim on which they are situated has been declared invalid.

When the owner's consent cannot be obtained, the following procedure is necessary before a building on an unpatented mining claim is destroyed:

(1) Gather preliminary data.

(a) Ascertain name of mining claim and last owner of record.

(b) If last owner is deceased, digest the following data: Probate, if any; known heirs and addresses.

(c) If person is believed to be living, through inquiry, try to obtain the last known address.

(d) Ascertain any evidence of assessment work that may have been recorded in county records and when any such work was last recorded.

(3) Evidence of any recent mining activity, location notices, etc.

(2) Request a mineral examination after all the preliminary data available on the case have been gathered.

(3) Initiate protest action under the General Mining Laws. When the owners of record cannot be located or are deceased, service by publication will be necessary. (FSH 2811.1, section 221.60)

After a mining claim has been declared null and void and the appeal time has expired, the Forest Service Supervisor may then take appropriate action for the removal of any structures.

TITLE 5300 - TRESPASS

5335.01b - Secretary's Regulation T-15 - Impounding of Personal Property.

(a) Automobiles or other vehicles, trailers, boats, camping equipment, and other inanimate personal property on National Forests or other land or waters under Forest Service control without the authorization of a Forest officer which are not removed therefrom within the prescribed period after a warning notice as provided in this regulation may be impounded by a Forest officer. Whenever such Forest officer knows the name and address of the owner, such impoundment may be effected at any time five days after the date that written notice of the trespass is mailed by registered mail or delivered to such owner, unless in the meantime the trespass has ceased.

(b) In the event the local Forest officer does not know the name and address of the owner, impoundment may be effected at any time 15 days after the date a notice of intention to impound the property in trespass is first published in a local newspaper and posted at the county courthouse and in one or more local post offices. A copy of this notice shall also be posted in at least one place on the property or in proximity thereto.

(36 CFR 261.16, promulgated Feb. 26, 1963 (28 F.R. 1769).

(c) Personal property of the kind specified in paragraph (a) of this section belonging to an owner whose identical property has been previously found in trespass during the calendar year, which subsequent to notice and action under (a) or (b) of this section, is found in continuing or subsequent trespass, within 12 months after the original notice of intention to impound such property is mailed or delivered to the owner or first published in the calendar year in a local newspaper and posted at the county courthouse and in one or more local post offices, may be impounded without further notice.

(d) Personal property impounded under this regulation may be disposed of at the expiration of 90 days after the date of impoundment. The owner may redeem the personal property within the 90-day period by submitting proof of ownership and paying all expenses incurred by the United States in advertising, gathering, moving, impounding, storing and otherwise caring for the property, and also for the value of the use of the site occupied during the period of the trespass.

(e) If the personal property is not redeemed on or before the date fixed for its disposition, it shall be sold by the Forest Service at public sale to the highest bidder. If no bid is received, the property, or portions thereof, may, in the discretion of the responsible Forest officer, be sold at private sale or be condemned and destroyed or otherwise disposed of. When personal property is sold, pursuant to this regulation, the Forest officer making the sale shall furnish the purchaser a bill of sale or other written instrument of evidence of the sale.

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-532

In the Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE B. WEISS, PETITIONER

v.

ROBERT C. LEHMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

BARBARA L. HERWIG
KATHERINE S. GRUENHECK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in this personal damages action against a federal employee for an alleged violation of petitioner's due process rights in connection with the destruction of certain of his personal property left on federal land, the court of appeals correctly remanded the case to the district court to determine, in light of this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), whether meaningful pre-deprivation process was impractical.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 2

Carlson v. *Green*, 446 U.S. 14 ..... 5, 6

Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 8

Parratt v. *Taylor*, 451 U.S. 527 ..... 2, 3, 6, 7

Constitution, statutes and regulation:

United States Constitution:

Fifth Amendment 2

Due Process Clause 2

Eighth Amendment 5

Federal Tort Claims Act:

28 U.S.C. 1346(b) 3, 5

28 U.S.C. 2671 *et seq.* 3

28 U.S.C. 2680(a) 5

Page

Constitution, statutes and regulation—Continued:

Tucker Act:

28 U.S.C. 1346(a)(2) 2

28 U.S.C. 1491 2

42 U.S.C. 1983 3

36 C.F.R. 262.4 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-532

EUGENE B. WEISS, PETITIONER

v.

ROBERT C. LEHMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The first decision of the court of appeals (Pet. App. 18a-23a) is reported at 642 F.2d 265. The subsequent opinion of the court of appeals (Pet. App. 1a-14a), following remand by this Court (454 U.S. 807), is reported at 676 F.2d 1320. The judgment of the district court (Pet. App. 24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1982. A petition for rehearing was denied on June 28, 1982 (Pet. 2; Pet. App. 15a-16a). The petition for a writ of certiorari was filed on September 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed this *Bivens*-type action[1] in the United States District Court for the District of Idaho against respondent, an employee of the United States Forest Service, seeking damages for the destruction of certain equipment and metal objects. Those items had been left unattended for at least six years at an unpatented placer mining claim located on federal land. The materials originally belonged to a lessee of the claim, but they reverted to the mine claimants after the lease expired and were later traded to petitioner in return for property located elsewhere. Petitioner's interest in the property was not recorded (Pet. App. 2a, 19a).

In this damages action, petitioner claimed that respondent caused this property to be destroyed in violation of his due process rights under the Fifth Amendment. Respondent's motion for summary judgment was denied and the case was tried to a jury, which returned a verdict for petitioner and awarded damages totaling $1,000. The court of appeals affirmed, holding that it was not error to imply a damages remedy against respondent in his personal capacity for a violation of petitioner's rights under the Due Process Clause. In so holding, the court of appeals rejected respondent's contention that a damages remedy should not be implied because petitioner had an equally effective remedy against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, seeking just compensation for a taking of his property (Pet. App. 19a, 21a-23a, 26a-27a).

2. After the court of appeals' original affirmance of the judgment, but before the time for filing a petition for certiorari had expired, this Court rendered its decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). In *Parratt*, a state prisoner

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[1]See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

sought to recover damages in a suit against a prison official under 42 U.S.C. 1983 for a violation of his due process rights in connection with the negligent loss of hobby materials. The Court concluded that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process." 451 U.S. at 539. In *Parratt* itself, the Court held that the fact that the loss of the property was negligent made pre-deprivation process impractical, and the availability of a remedy against the State under the Nebraska Tort Claims Act was found to constitute adequate post-deprivation process. Accordingly, there was no due process violation. *Id.* at 541-544.

Respondent filed a petition for a writ of certiorari in this Court, contending that under the reasoning of *Parratt* v. *Taylor,* pre-deprivation process was equally impractical in this case and that the availability of a remedy under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, provided adequate post-deprivation process with respect to the loss of petitioner's property. On October 5, 1981, the Court vacated the judgment of the court of appeals and remanded the case to that court for consideration of petitioner's due process claim in light of *Parratt* v. *Taylor.* See 454 U.S. 807.

3. On remand, the court of appeals, by a 2-1 vote, vacated the judgment in favor of petitioner and remanded to the district court for further proceedings (Pet. App. 1a-14a). The court of appeals observed that under *Parratt* v. *Taylor,* there was no due process violation in this case if (i) meaningful pre-deprivation process was impractical, and (ii) an adequate post-deprivation remedy was available (*id.* at 3a).

The court of appeals found that it could not determine from the "limited record" before it whether meaningful pre-deprivation process was impractical in the particular circumstances of this case, noting that petitioner's allegations and the evidence offered in support of them permit a conclusion that respondent "acted no worse than negligently with respect to [petitioner's] ownership interest" (*ibid.*). The court observed that petitioner argued that the deprivation would not have occurred if petitioner had followed Forest Service procedures for the destruction of personal property, which provide for the impoundment and disposition of personal property after notice to the owner or, if the owner's name and address are unknown, after public notice (Pet. App. 3a, citing 36 C.F.R. 262.4). But, the court reasoned, "[s]ince removal of mere debris, such as an old, rusty car thought to be abandoned and worthless, would not require compliance with 36 C.F.R. Sec. 262.4, the asserted failure to comply here, based on the evidence in the record, would appear to have been no more than a negligent oversight" for which meaningful pre-deprivation process would be impractical under *Parratt* (Pet. App. 3a).

The court of appeals further observed that, as in *Parratt*, (451 U.S. at 543), petitioner did not argue that the Forest Service procedures themselves were inadequate. Moreover, the court concluded that the Forest Service cannot "reasonably be expected to provide notice before negligently departing from proper procedures by destroying property erroneously believed to be abandoned and worthless" (Pet. App. 4a). The court therefore remanded to the district court to afford petitioner an opportunity to pursue his due process claim by showing additional facts, such as intentional destruction of his property interest, that would make the *Parratt* limitation inapplicable (*id.* at 6a).

The court of appeals found the second part of the *Parratt* test — the existence of an adequate post-deprivation remedy — "more clearly satisfied" here, because of the existence of a remedy against the federal government under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.* The court rejected petitioner's argument that the FTCA remedy would not afford adequate post-deprivation process because the conduct complained of would fall within the "discretionary function or duty" exception to liability in 28 U.S.C. 2680(a) (Pet. App. 4a-5a).

ARGUMENT

The decision of the court of appeals remanding to the district court for further proceedings regarding the application of *Parratt* v. *Taylor* to the circumstances of this case is correct and does not warrant further review.

1. Petitioner contends (Pet. 8-9) that the decision of the court of appeals is inconsistent with the decision of this Court in *Carlson* v. *Green*, 446 U.S. 14 (1980). This argument is clearly misplaced. In *Carlson* v. *Green*, the Court rejected the argument that a cause of action for damages should not be recognized for an alleged violation of the Eighth Amendment by federal prison officials because the plaintiff had an adequate remedy against the United States under the FTCA. The issue thus was not whether the conduct complained of violated the constitutional rights of the plaintiff's decedent, but whether a cause of action for damages should be implied even assuming that there was a constitutional violation.

Here, in contrast, the issue is whether respondent's conduct even violated petitioner's constitutional rights. Under *Parratt*, if it is impractical to afford meaningful pre-deprivation process, and if there is adequate post-deprivation process for assessing the propriety of the governmental action by pursuing remedies under a compensation scheme

such as the FTCA or (as in *Parratt*) the Nebraska Tort Claims Act, then the individual has not been deprived of property without due process of law.This case does not involve the analytically quite distinct question involved in *Carlson* v. *Green*: whether, assuming that there has been a constitutional violation, a cause of action for damages should be implied against a federal official for that violation, in view of the existence of another remedy.[2]

2. Petitioner also argues (Pet. 10-11) that the court of appeals erred in its consideration of whether meaningful pre-deprivation process was "impractical" in the circumstances of this case. This fact-bound contention does not warrant review, especially since the court of appeals merely remanded to the district court for further proceedings on the issue (Pet. App. 3a-4a, 6a).

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[2]Petitioner's contention (Pet. 9) that the FTCA is not an adequate remedial scheme for these purposes is wholly without merit. In *Carlson* v. *Green*, the Court, in support of its conclusion that Congress did not intend to limit the plaintiff in that case to an FTCA remedy, observed that a *Bivens* action serves a deterrent function that may not be present in an FTCA suit and that a jury trial and punitive damages are not available in an FTCA suit. 446 U.S. at 20-23. But the Court in *Parratt* specifically rejected the argument that these attributes of the remedies under the state compensation scheme rendered those remedies inadequate for due process purposes. 451 U.S. at 543-544.

The other indicium of congressional intent cited in *Carlson* v. *Green* — that FTCA liability is governed by state law, while the liability of federal officials "for violations of citizens' constitutional rights" should depend upon a uniform federal rule (446 U.S. at 23) — likewise has no bearing on this case. The question here is not whether federal officials should be liable for a constitutional violation, but whether there has been a constitutional violation at all. Petitioner does not argue that recovery was unavailable under the FTCA. Whether such recovery is based on a uniform federal law or incorporated state law is irrelevant for purposes of the due process issue, because the remedies under the FTCA "could have fully compensated [petitioner] for the property loss he suffered" (*Parratt* v. *Taylor*, *supra*, 451 U.S. at 544) and therefore are "sufficient to satisfy the requirements of due process" (*ibid.*).

After reviewing what it termed the "limited record" on this issue, the court of appeals found that petitioner's allegations and the evidence offered in support of them permitted the conclusion that respondent "acted no worse than negligently with respect to [petitioner's] ownership interest," because petitioner's failure to comply with the procedures in the regulations with respect to the particular property involved "would appear to have been no more than a negligent oversight" (Pet. App. 3a). Petitioner's ownership interest in the property was not recorded, and he did not allege that respondent or any other Forest Service employee knew of his interest or that petitioner acted with the intent to destroy property known or thought to belong to another person (*id.* at 2a), as distinguished from abandoned or worthless property. As the court of appeals observed on the basis of this finding (*id.* at 4a), the Forest Service cannot reasonably be expected to publish notice before destroying abandoned and worthless property,[3] or to provide notice whenever one of its employees negligently departs from established procedures before destroying property erroneously believed to be abandoned or worthless (*ibid.*).

If respondent's conduct with respect to petitioner's ownership interest in the property was merely negligent, it was "impractical" here for the government to provide meaningful pre-deprivation process, just as it was in *Parratt* v. *Taylor*. See 451 U.S. at 541. In such circumstances, the opportunity for a post-deprivation remedy under the FTCA would have afforded petitioner adequate process.

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[3]Petitioner does not dispute that the Forest Service need not furnish notice before destroying abandoned and worthless property; he asserts only that petitioner's decision not to do so in the circumstances of this case was "unreasonably wrong" (Pet. 10). The quoted phrase alleges only negligent conduct.

In any event, petitioner is not barred from recovery under the court of appeals' decision. The court of appeals remanded for further proceedings in which petitioner will have the opportunity to show that meaningful pre-deprivation process was not impractical in this case.

3. Petitioner contends (Pet. 11-12) that the court of appeals' holding that meaningful pre-deprivation process was impractical if respondent acted only negligently with respect to petitioner's property interest is inconsistent with this Court's holding in *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982). This contention is frivolous. In *Harlow* v. *Fitzgerald*, the Court held that an objective test should govern the availability of the qualified immunity defense to a personal damages action for an alleged violation of constitutional rights. Slip op. 14-18. The issue decided by the court of appeals in this case, in contrast, did not concern qualified immunity from liability for a constitutional violation, but rather whether there was a constitutional violation at all if meaningful pre-deprivation process could not reasonably have been provided.

Indeed, to the extent that *Harlow* v. *Fitzgerald* is relevant here, it further supports the court of appeals' vacating of the judgment against respondent. As petitioner acknowledges (Pet. 7), the jury was instructed that in order for respondent to be protected by qualified immunity, it had to find that he acted reasonably and in good faith. The latter part of the instruction is inconsistent with this Court's decision in *Harlow* v. *Fitzgerald* abandoning the subjective element of the qualified immunity defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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